No. 92-1856

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CITY OF LADUE, EDITH J. SPINK, MAYOR OF THE CITY OF LADUE, THOMAS R. REMINGTON, GEORGE L. HENSLEY, GALE F. JOHNSTON, JR., ROBERT A. WOOD, ROBERT D. MUDD, JOYCE T. MERRILL, AS MEMBERS OF THE CITY COUNCIL OF THE CITY OF LADUE,
Petitioners,

v.

MARGARET P. GILLEO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erroneously held, in conflict with the reasoning of *City of Cincinnati v. Discovery Network, Inc.*, —— U.S. ——, 113 S. Ct. 1505 (1993), that the City of Ladue's sign ordinance is content-based in violation of the First Amendment because it allows limited exceptions to its prohibition of noncommercial and commercial signs, even though it is undisputed that the content-neutral legislative purpose of the exceptions and of the ordinance as a whole is to prohibit only those signs which, by their function or location, are most likely to proliferate, cause visual blight, diminish the value of real estate, or create safety hazards.

2. Whether, by relying on the plurality opinion in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981), which is in conflict with the reasoning of *City of Cincinnati v. Discovery Network, Inc.*, —— U.S. ——, 113 S. Ct. 1505 (1993), the Court of Appeals mistakenly assumed that noncommercial speech deserves greater First Amendment protection than commercial speech and, as a result, erroneously held that the limited exceptions in the City of Ladue's sign ordinance favor commercial speech over noncommercial speech, rendering the ordinance unconstitutional.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-8a) is reported at 986 F.2d 1180 (8th Cir. 1993). The opinions of the District Court (Pet. App. 11a-31a) are reported at 774 F. Supp. 1559-1568 (E.D. Mo. 1991).

JURISDICTION

The judgment of the Court of Appeals was entered on February 22, 1993, the date the court's opinion was filed. Pet. App. 1a. On May 4, 1993, the Eighth Circuit amended its opinion by substituting three new pages from its original opinion to correct technical errors. Neither party filed a petition for rehearing. The petition for a writ of certiorari was filed on May 21, 1993, and was granted on October 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in part: "Congress shall make no law * * * abridging the freedom of speech * * *."

The City of Ladue's sign ordinance, enacted on January 21, 1991, and amended on February 25, 1991, will be referred to as "New Chapter 35" or the "sign ordinance" of the Code of the City of Ladue.[1] New Chapter 35 is reproduced in its entirety in the Joint Appendix, pages 116-131. *See also* Pet. App. 35a-50a.

STATEMENT

The question presented in this case is whether the City of Ladue, a small and principally residential community,

[1] On January 21, 1991, the City of Ladue (hereinafter "Ladue") repealed the then-existing Chapter 35 of the City Code relating to signs. The parties have referred to Ladue's predecessor sign ordinance as "Old Chapter 35."

has the right to protect the quality of life of its residents by prohibiting noncommercial and commercial signs that proliferate, cause visual blight, diminish the value of real estate, or create safety hazards.

I. Ladue's Sign Ordinance.

Ladue's sign ordinance generally prohibits all signs within Ladue. J.A. 121, New Chapter 35, § 35-2. The ordinance permits a limited number of noncommercial and commercial signs which "either contribute substantially to the public safety and welfare or, because of their limited number, location, and size, do not substantially impinge upon the City of Ladue's interests in privacy, aesthetics, safety and maintenance of property values so as to necessitate a total ban of all signs." J.A. 119, New Chapter 35, "Declaration of Findings, Policies, Interests, and Purposes."

The limited number of exceptions to Ladue's prohibition of signs include the following:

> municipal signs, subdivision and residence identification signs, road signs and driveway signs for danger, direction, or identification, health inspection signs, signs for churches, religious institutions, and schools, identification signs for not-for-profit organizations, signs identifying the location of public transportation stops, signs advertising the sale or rental of real property, commercial signs in the commercially zoned districts (1% of the total acreage of Ladue) and in the industrial zoned districts (2% of the total acreage of Ladue), and signs identifying safety hazards.

J.A. at 121-122, New Chapter 35, § 35-4.

Ladue's sign ordinance does not favor the content of any particular viewpoint expressed through a sign. Political, nonpolitical, controversial, and noncontroversial signs are all prohibited under Ladue's ordinance. Signs "For Peace In The Persian Gulf" violate Ladue's ordinance as do signs that say, "Wage War In The Gulf—Kill Saddam Hussein." Signs that ask residents to "Vote for School Taxes" violate Ladue's ordinance as do signs that announce, "Celebrate Joe's Fortieth Birthday." In addition,

most commercial and noncommercial signs are prohibited. One may not advertise a "Bake Sale" or "School Picnic" in residential neighborhoods. None of these signs is prohibited because of the content of its message. All of these signs are prohibited because the proliferation of signs in Ladue and the resulting blight offend the City's significant interests in aesthetics, safety, and the maintenance of real estate values. J.A. 116-119, New Chapter 35, "Declaration of Findings, Policies, Interests, and Purposes."

II. Ladue's Comprehensive Commitment To Preserving The Natural Beauty Of Its Community.

Ladue is a small and predominantly residential community of approximately 8.5 square miles. J.A. 116. Limited areas of Ladue have been zoned for commercial or industrial use. *Id.* Malcolm C. Drummond, a professional city planner and national expert in the field of municipal zoning regulations and land-use, and the Honorable Edith J. Spink, Mayor of the City of Ladue, prepared detailed affidavits describing Ladue's longstanding and comprehensive interests in maintaining aesthetic, privacy, safety, and real estate values. J.A. 138-159, Drummond Aff., J.A. 161-183, Spink Aff.

Drummond's testimony underscores the strength of Ladue's comprehensive commitment to the beautification of its City:

> Since its inception [in 1936], Ladue has made extraordinary and consistent efforts to preserve and enhance the aesthetic quality of its environment; to my personal observation, Ladue has made more sustained and consistent efforts in this regard than any other municipality which I have professionally advised, or with which I have been professionally associated, bar none; * * *.

J.A. 147, Drummond Aff. ¶ 41.

A. Ladue's Unique Aesthetic Ambience.

Ladue has a unique and special heritage, with historical antecedents to settlements in the early nineteenth century.

J.A. 141-144, Drummond Aff. ¶¶ 19-22, J.A. 163-165, Spink Aff. ¶¶ 18-23. The City has a "rich inventory of buildings of special historical and/or architectural significance." J.A. 141-142, Drummond Aff. ¶ 19. *See also* J.A. 141-144, Drummond Aff. ¶¶ 18-26 & Exs. B and C (historic buildings surveys of the eastern and central portions of Ladue), J.A.163-165, Spink Aff. ¶¶ 20-24.

Malcolm Drummond summarized his opinion of Ladue's unique ambience as follows:

> The large lot sizes and low building density have allowed for the maintenance of large areas of plant materials, woods, streams and open areas which make Ladue unique in the Midwest; I have done professional work for such midwestern cities as Indianapolis, Detroit, Cleveland, Chicago, Minneapolis, Omaha, Kansas City, Memphis, Dallas and Houston and, while each has lovely residential suburbs, in my opinion none has any suburb which can compare with Ladue in its aesthetic ambience and privacy or in the charm and visual quality it has been able to maintain through preservation of its low density, rustic, heavily-wooded, uncluttered and open appearance; * * *.

J.A. 149-150, Drummond Aff. ¶ 56. *See also* J.A. 171, 184, Spink Aff. ¶ 51, Ex. A (aerial photograph of Ladue showing abundance of trees throughout the City).

A principal reason for Ladue's special ambience is the City's zoning and land-use regulations and Ladue's strong adherence to its original Comprehensive City Plan. J.A. 151, Drummond Aff. ¶¶ 62-64, J.A. 173, Spink Aff. ¶¶ 67-68.

Ladue established an Architectural Review Board in 1940 to preserve the City's aesthetic and visual harmony by carefully regulating all architectural changes. J.A. 147, Drummond Aff. ¶ 44, J.A. 170, Spink Aff. ¶ 47. All applications for building permits that affect the appearance of a building must be approved by this Board. J.A. 147, Drummond Aff. ¶ 44, J.A. 170, Spink Aff. ¶ 47.

Ladue organized a Civic Improvement Committee in the late 1940's to "foster and encourage the beautification and aesthetic improvement of all public and semi-public areas * * *." J.A. 176, Spink Aff. ¶ 81, J.A. 153-154, Drummond Aff. ¶¶ 75-76. This Committee, which has been continuously active since its inception, has facilitated and planned the planting and maintenance of trees, shrubs, and flowers throughout the City. J.A. 184 (aerial photograph of Ladue), J.A. 176-178, Spink Aff. ¶¶ 81-83 & Ex. D (copies of the minutes and activities summaries of the Civic Improvements Committee from 1970 through 1990) & Exs. E-S (photographs of various beautification projects, 1983 to present), J.A. 153-154, Drummond Aff. ¶¶ 75-76.

The City has improved the aesthetic quality of its principal commercial area through the creation of the Special Business District. J.A. 151-153, Drummond Aff. ¶¶ 65-74 & Ex. J (Study and Recommendation for Special Business District, 1982), Ex. K (color rendering of the 1982-1983 Special Business District Improvements), Ex. L (blueprint for the 1982-1983 Special Business District Improvements), Exs. M-P (photographs of Special Business District before the 1982-1983 improvements), Exs. O-T (Photographs of Special Business District after the 1982-1983 improvements), and J.A. 174-176, Spink Aff. ¶¶ 70-80. As a result of the substantial beautification efforts in the Special Business District, Ladue received the Governor's Town Treescape Award in 1984 from then-Missouri Governor Christopher Bond. J.A. 176, Spink Aff. ¶ 79 & Drummond Ex. U (Governor's Town Treescape Award of 1984), J.A. 153, Drummond Aff. ¶ 73.

Malcolm Drummond concluded that Ladue's "intense public interest in maintaining exceptionally high aesthetic and environmental standards is demonstrated by long standing and continuous efforts by both the City and private organizations to upgrade, improve and beautify all areas visible to the public." J.A. 153, Drummond Aff. ¶ 74. *See also* J.A. 176, Spink Aff. ¶ 80.

B. *Ladue Has Consistently Protected The Special Character Of Its Beautiful Residential Neighborhoods.*

Since its incorporation as a City in 1936, Ladue has made an extraordinary commitment to careful planning and zoning. Ladue has codified its zoning and land-use restrictions and has diligently enforced its comprehensive regulations to preserve the aesthetic and private qualities of Ladue's residential community. J.A. 145-150, Drummond Aff. ¶¶ 32-57, Ex. F (copy of Ladue's Zoning Ordinance), Ex. G (copy of Ladue's zoning map), J.A. 160, Drummond Aff. Ex. H (color map of Ladue showing residential areas in green and nonresidential areas in pink and blue), J.A. 166-172, Spink Aff. ¶¶ 32-62.

Ladue's original Comprehensive City Plan was prepared by the renowned city planner, Harland Bartholomew, who is well known for his work in restoring the historic colonial city of Williamsburg, Virginia. J.A. 144, Drummond Aff. ¶ 29, Ex. E (highlights of Bartholomew's professional career), J.A. 144, Drummond Aff. ¶ 28 & Ex. D (Harland Bartholomew's "A Preliminary Report Upon a City Plan, City of Ladue, Missouri" submitted to Ladue City Council in March, 1939), J.A. 166, Spink Aff. ¶ 30. Drummond observed that Ladue "has been both consistent and unwavering in disapproving any architectural, aesthetic, zoning, or land use changes which would [be] out of keeping with the original vision set out by Harland Bartholomew." J.A. 144-145, Drummond Aff. ¶ 31. *See also* J.A. 166-167, Spink Aff. ¶ 32.

Ladue's commitment to strict zoning regulations is reflected in its successful defense of its land-use ordinances for almost forty years. J.A. 145-146, Drummond Aff. ¶ 38 (collecting reported cases), J.A. 168-169, Spink Aff. ¶ 10 (same).

III. Signs Will Proliferate And Create Visual Blight If Ladue Is Not Permitted To Limit The Number And Location Of Noncommercial And Commercial Signs.

Ladue has maintained strict regulations of signs since the formation of the City. J.A. 156-157, Drummond Aff. ¶¶ 92-93 & Exs. V-Z (zoning ordinances of the three predecessor villages to Ladue) and Exs. AA-JJ (Ladue's sign ordinances and their amendments from 1959 through present), J.A. 179, Spink Aff. ¶¶ 89-91. Drummond opined that the "careful regulation of signage is an essential element of city planning" and the "location, existence and design of signage in a community directly affect the visual and aesthetic appeal * * *." J.A. 154, Drummond Aff. ¶ 77. Drummond also stated that Ladue's regulation of signs has fostered its interests in privacy, aesthetics, safety, and maintenance of real estate values. J.A. 156, Drummond Aff. ¶ 91. *See also* J.A. at 179, Spink Aff. ¶ 89.

Drummond opined that "[i]t is a basic and accepted principle of urban planning, and a principle which I hold to be fundamental, that a proliferation of signs causes visual blight." J.A. 155, Drummond Aff. ¶ 82. Based upon his many years of professional experience, Drummond testified that the failure to regulate signs in Ladue will create a serious proliferation problem, which already exists in many municipalities in St. Louis County. J.A. 154-156, Drummond Aff. ¶¶ 78-90. *See also* J.A. 178-180, Spink Aff. ¶¶ 86-94, J.A. 197-198, Spink Supp. Aff. (additional factual support for Drummond's findings). Drummond testified that those cities in the St. Louis area that have chosen not to regulate signage strictly have suffered the consequences of proliferation and visual blight. J.A. 154-155, Drummond Aff. ¶¶ 81-82. As Drummond observed:

> Based upon my personal knowledge and experience, many municipalities in St. Louis County which do not strictly limit the erection of signs frequently experience a proliferation of yard signs and placards and temporary public signs in the public rights-of-

> way; this is true especially in the campaigns before municipal, primary, or general elections but such proliferation can and often does occur at other times as well; I have observed such proliferation in Ferguson, Webster Groves, St. Ann, Berkeley, Manchester and Ellisville, which are all cities in the St. Louis metropolitan area which I have served as a Planner.

J.A. 154-155, Drummond Aff. ¶ 81.

Drummond analyzed and evaluated the impact of New Chapter 35 on Ladue. J.A. 157, Drummond Aff. ¶ 94. Based upon his education, training, background, and professional experience, Drummond stated that the regulations and policies contained in the ordinance promote the "City's interests in aesthetic excellence, privacy, maintenance of property values and safety, which have been the City's guiding zoning, land use and sign regulatory principles." J.A. 157-158, Drumond Aff. ¶ 97. *See also* J.A. 157, Drummond Aff. ¶¶ 94-96.

IV. Respondent's Signs Are Not Permitted Under The General Prohibition Of Signs Contained In Ladue's Ordinance.

Respondent resides on Willow Hill Lane, in the Willow Hill subdivision of Ladue. J.A. 181-182, Spink Aff. at ¶¶ 99, 101, 103. Willow Hill Lane is typical of most of Ladue's 207 private subdivision streets. J.A. 173, Spink Aff. at ¶¶ 65, 66. The street is privately owned and maintained by the trustees of the subdivision and governed by a trust indenture containing restrictions on the use of one's real estate. J.A. 182, Spink Aff. ¶¶ 100-101. While Willow Hill is "country-like, charming and private," it is also extremely narrow and winding and lacks adjacent sidewalks. J.A. 173, Spink Aff. ¶ 65.

Respondent has maintained signs in her front yard and on one of her home's windows facing the street. Pet. App. 22a (District Court opinion), Pet. App. 3a (Eighth Circuit opinion). These signs contained the messages. "Say No To War In The Persian Gulf Call Congress Now," and "For Peace In The Gulf." *Id.* Respondent's

signs are not permitted under Ladue's sign ordinance. J.A. 121, New Chapter 35, § 35-2.

V. Proceedings In The Lower Courts.

Respondent filed a Complaint against Ladue pursuant to 42 U.S.C. § 1983 in which she challenged the constitutionality of Ladue's sign ordinance under the First Amendment of the United States Constitution. Respondent sought injunctive relief to prevent Ladue from enforcing its sign ordinance.

The parties filed cross-motions for summary judgment. In support of its motion, Ladue filed an extensive evidentiary record consisting of the affidavits of Malcolm C. Drummond and Mayor Edith J. Spink. J.A. 138-159, Drummond Aff., J.A. 161-183, Spink Aff. Ladue and its affiants filed seventy exhibits in support of the constitutionality of Ladue's sign ordinance.

During the many months in which this case was pending in the District Court, respondent did not introduce any expert testimony that conflicted with the facts and opinions contained in Drummond's and Spink's affidavits. The only evidence respondent introduced into the summary judgment record was an affidavit by Nancy R. Sachs, a resident of Ladue, and several photographs of respondent's signs. J.A. 190-193, Sachs Aff. & J.A. 194-195 (copies of photographs). Sachs did not claim to have any professional qualifications, or experience in urban planning, land-use, municipal government, or in the planning or administration of the City of Ladue. J.A. 190, Aff. ¶ 1.

The record demonstrates that Ladue has consistently "applied" its current and predecessor sign ordinances in a constitutional fashion. Respondent offered no evidence that suggests any discriminatory enforcement of Ladue's sign ordinances since the City was founded.

The District Court granted respondent's and denied Ladue's motion for summary judgment. Pet. App. 11a-21a. The court held that Ladue's sign ordinance "on its face" violated the First Amendment, and permanently enjoined

Ladue from enforcing its sign ordinance.[2] Pet. App. 16a-21a, 31a. The Eighth Circuit affirmed the District Court's judgment on the merits. Pet. App. 1a-8a. Neither the Eighth Circuit nor the District Court, however, mentioned the significance of Ladue's exhaustive evidentiary record in support of its sign ordinance. J.A. 1a-8a (Eighth Circuit opinion); 11a-31a (District Court opinion).

The Eighth Circuit acknowledged that "Ladue's interests in enacting its ordinance are substantial." Pet. App. 7a. The Court also recognized that the ordinance is "viewpoint neutral." Pet. App. 4a n.5. Nevertheless, relying on the plurality opinion in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981), the Court of Appeals agreed with the District Court and held that the limited exceptions to Ladue's general prohibition of signs indicated that "Ladue's ordinance violates the First Amendment by favoring commercial speech over noncommercial speech and by favoring certain types of noncommercial speech over others." Pet. App. 8a (Eighth Circuit opinion); Pet. App. 31a (District Court opinion).

The District Court and the Eighth Circuit each granted respondent a substantial award for attorneys' fees and expenses pursuant to 42 U.S.C. § 1988.[3]

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[2] Although Ladue's sign ordinance has a severability clause, the District Court effectively refused to enforce it by enjoining § 35-2, which prohibits all signs, as well as § 35-4, which allows limited exceptions to the general prohibition against signs. J.A. 121, 122. The severability clause provides that if any of the "sections, paragraphs, clauses, and phrases" of the sign ordinance are declared invalid, the remaining provisions of the ordinance shall be effective. J.A. 130-131, New Chapter 35, § 35-24. Severability clauses in municipal ordinances are valid and enforceable under Missouri law. *Pearson v. City of Washington*, 439 S.W.2d 756, 762 (Mo. 1969).

[3] After receiving "demand" letters from respondent's attorneys for payment of her attorneys' fees and expenses, Ladue was compelled to pay these awards in full. If, however, this Court reverses the Eighth Circuit's judgment, respondent will have no right to payment of any attorneys' fees and expenses under 42 U.S.C. § 1988. Under these circumstances, respondent and her attorneys must immediately return all attorneys' fees, expenses, and accrued interest to Ladue.

SUMMARY OF ARGUMENT

The City of Ladue is a small, residential community of 8.5 square miles that is filled with beautiful landscapes and natural settings. The protection of the natural beauty and environment of the City is one of the hallmark values that Ladue has nourished since it was founded in 1936. The uncontested record in the District Court establishes that Ladue has made a comprehensive commitment to aesthetics evidenced not only by its regulation of signs but also by its zoning laws and numerous beautification projects.

1. Ladue's sign ordinance satisfies the test under which this Court traditionally reviews reasonable regulations of the "time, place, or manner" of speech on public and private property. *See, e.g., Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989) (public property); *Barnes v. Glen Theatre, Inc.*, —— U.S. ——, 111 S. Ct. 2456, 2460 (1991) (private property).

First, the ordinance is content-neutral because its significant governmental purposes—prevention of visual blight, privacy, safety, the preservation of real estate values—are unrelated to the content of the speech on the signs. Visual blight created on public and private property is a nuisance that is traditionally subject to the government's regulatory and police powers.

Second, the ordinance is narrowly tailored because it directly and effectively remedies the problems that the ordinance was designed to prevent. The summary judgment record is undisputed that without its sign ordinance, Ladue would suffer from the proliferation of signs and resulting visual blight that exist in some of Ladue's neighboring cities.

As the Court observed in *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent,* 466

U.S. 789 (1984), "the substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself." *Id.* at 810. Thus, "[b]y banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy." *Id.* at 808.

Third, Ladue's ordinance does not jeopardize a person's freedom of speech because alternative and ample modes of expression are available other than the medium of signs. The record is undisputed that Ladue's sign ordinance does not affect any individual's right to communicate through numerous modes of speech including letters, flyers, telephone calls, bumper stickers, newspaper advertisements, and speeches. In *Vincent*, 466 U.S. at 812-13, this Court rejected the notion that noncommercial and political signs were a "uniquely valuable or important mode of communication" that demand absolute protection regardless of the ill effects of sign proliferation.

Respondent challenged Ladue's sign ordinance because it prevented her from erecting noncommercial and political signs on her property. Ladue is not concerned with the content of respondent's signs; it is concerned with the visual blight caused by the proliferation of signs throughout the City.

If the First Amendment is interpreted to prevent Ladue from legislating to prevent the proliferation of signs, its residents would be compelled to suffer the evils of visual blight that already plague so many areas of the nation. Federal, State and local governmental authorities would lose the right to prevent individuals from erecting an unlimited number of noncommercial and commercial signs—from political graffiti to business advertisements—in the private and public areas of the nation's cities, towns, streets, highways, parks, scenic attractions, and residential communities. As this Court observed in *Ward*, 491 U.S. at 801, "[t]he validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case."

2. The lower courts erroneously relied on the plurality's implied discrimination theory in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), which is distinguishable but, in any event, has been rejected by a majority of the Court. The Eighth Circuit and the District Court held that Ladue's sign ordinance violated the First Amendment because it discriminated against speech by permitting limited exceptions to its general prohibition of signs.

The courts below, however, ignored the text of the sign ordinance and the uncontested evidentiary record that explain Ladue's content-neutral justification for the limited exceptions in the ordinance. The ordinance only permits those signs which are necessary for the public's safety, or which, by their function or location, will not proliferate and cause visual blight.

The plurality's implied discrimination theory should be be rejected because it places Ladue and other cities in a "Catch 22" position. The lower courts have overturned Ladue's sign ordinance because it permits exceptions to its total ban of signs. Yet, if Ladue were realistically able to ban all signs (which it is not), such an ordinance would be unconstitutional because it would be overbroad by banning signs that do not proliferate and cause visual blight or other problems. By carefully permitting exceptions to its ordinance, Ladue is protecting First Amendment interests by allowing as much speech as possible through the medium of signs consistent with the valid objective of the ordinance.

The strength of Ladue's case is evidenced by its ability to satisfy the strict test established by Justice Brennan in his concurring opinion in *Metromedia*. Justice Brennan, who was joined by Justice Blackmun, criticized the *Metromedia* plurality's implied discrimination theory. These Justices concurred in the Court's judgment but expressly rejected the "all or nothing" approach of the plurality. Indeed, in his concurring opinion, Justice Brennan went so far as to characterize the plurality's view as "mak-

[ing] little sense." 453 U.S. at 532 n.10 (Brennan, J., concurring, joined by Blackmun, J.).

Justices Brennan and Blackmun would permit a city's prohibition of signs with narrowly tailored, content-based exceptions. 453 U.S. at 532, 533 & n.10. Before upholding such a prohibition, however, Justices Brennan and Blackmun would require the municipality to make a record that it is "seriously and comprehensively addressing aesthetic concerns." 453 U.S. at 531.

Justices Brennan and Blackmun concluded that they had "little doubt" that some cities—such as the historic community of Williamsburg, Virginia—could prove the substantiality of their interest in aesthetics. 453 U.S. at 534. The City of Ladue is precisely the type of unique community—dedicated to furthering the goals of aesthetics and safety—that can meet Justice Brennan's strict constitutional standards under which a prohibition on signs with narrowly tailored exceptions would be permitted.

3. Ladue's right to regulate sign proliferation is strengthened because of the importance of aesthetics in the private, residential neighborhoods, that form most of the small community of Ladue. Ladue has an important interest in protecting the privacy of all of the residential areas of Ladue from visual blight caused by the proliferation of signs.

Ladue's right to abate the nuisance of visual blight is particularly strong when one considers that its residents are "captive" to the eye sores created by signs that multiply through their neighborhoods. As Justice Brandeis observed for the Court in *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932), "[t]he radio can be turned off, but not so the billboard or street car placard." Signs continuously intrude on one's ability to enjoy the natural beauty of one's city. Ladue, therefore, should be allowed to prevent the proliferation of signs that threaten the aesthetic values that the City has maintained throughout its history.

ARGUMENT

I. LADUE'S SIGN ORDINANCE SATISFIES THIS COURT'S TEST THAT PERMITS REASONABLE "TIME, PLACE, OR MANNER" REGULATIONS OF SPEECH ON PUBLIC AND PRIVATE PROPERTY.

In *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), the Court held that one's right to free speech must yield to the government's reasonable "time, place, or manner" regulations of speech when three conditions are met:

1. The regulations are "*justified* without reference to the content of the regulated speech." *Id.* (quoting *Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 293 (1984) (emphasis added in *Ward*));
2. The regulations are "narrowly tailored to serve a significant governmental interest." *Id.*; and
3. The regulations "leave open ample alternative channels for communication of the information." *Id.*

Ward involved New York City's regulation of loud and disturbing sound caused by musical concerts in Central Park. *Id.* In *Barnes v. Glen Theatre, Inc.*, —— U.S. ——, 111 S. Ct. 2456, 2460 (1991), the Court applied the "time, place, or manner" test to "conduct occurring on private property."

The "time, place, or manner" test is appropriate because Ladue's sign ordinance involves the regulation of signs and not a total ban on signs. Noncommercial and commercial signs are permitted if they do not proliferate or affect safety. In addition, Ladue's sign ordinance only regulates one medium of speech: signs. Numerous other modes of speech are available for people to express themselves.

Ladue's New Chapter 35 satisfies each of the Supreme Court's three conditions described in *Ward*. The lower

courts erred by misinterpreting *Ward* and misapplying its test to Ladue's sign ordinance.

A. This Court Should Apply The Test In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), To Ladue's Sign Ordinance, Which Is Designed To Prevent Visual Blight Caused By A Proliferation Of Signs.

This case involves the unique regulatory problems that local, State, and federal governmental authorities face when they seek to eliminate visual blight and other evils caused by the proliferation of signs. An accepted principle of First Amendment speech jurisprudence is that each manner of expression is "a law unto itself" and reflects its own "differing natures, values, abuses and dangers." *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring). *See also FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978); *R.A.V. v. City of St. Paul*, —— U.S. ——, 112 S. Ct. 2538, 2568 (1992) (Stevens, J., dissenting).

Members of the City Council of the City of Los Angeles v. Vincent, 466 U.S. 789 (1984), is the seminal case in which this Court applied the "time, place, or manner" test to the unique context of a city's sign regulation designed to prevent visual blight. In *Vincent*, the Court upheld Los Angeles' ordinance that prohibited the posting of signs, including those containing political messages, on public property. 466 U.S. at 807-810, 816-817. The ordinance had been applied to prohibit signs on utility poles. *Id.* The *Vincent* Court evaluated Los Angeles' sign ordinance based on the legal test announced in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *Vincent*, 466 U.S. at 804-805. In *Barnes*, the Court characterized the *O'Brien* test as "embody[ing] much the same standards" as the "time, place, or manner" test described in *Ward*. *Barnes*, 111 S. Ct. at 2460. *See also R.A.V.*, 112 S. Ct. 2544.

The Court's central thesis in *Vincent* is that "the substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of

expression itself." *Vincent*, 466 U.S. at 810. Thus, "[b]y banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy." 466 U.S. at 808. Ladue will demonstrate that its sign ordinance is constitutional under the Court's analysis in *Vincent*, *Ward*, *R.A.V.*, and *City of Cincinnati v. Discovery Network, Inc.*, —— U.S. ——, 113 S. Ct. 1505 (1993).

B. This Court Has Held That Aesthetics, Privacy, Safety, And The Maintenance Of Real Estate Values Are Significant Governmental Interests That Cities May Protect.

Ladue's interests in aesthetics, privacy, safety, and the maintenance of real estate values "justify" the regulation of signs contained in its sign ordinance. J.A. 116-119, New Chapter 35, Article I. This Court has held that each of these purposes of legislative action is a significant governmental interest that supports reasonable regulation by federal, State, or local laws. *Vincent*, 466 U.S. at 817. *See also Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion); *State v. Hodgkiss*, 565 A.2d 1059, 1064, 1065 (N.H. 1989) (opinion of Souter, J.) (upholding constitutionality of city ordinance that prohibited signs that caused "visual defilement" of public property; ordinance furthered "substantial public interest in preventing visual assault by an accumulation of signs on public property").

The *Vincent* Court recognized that proliferation of signs would likely develop in a city that does not regulate the number of permitted signs. 466 U.S. at 817 (If signs were permitted to remain, they "would encourage others to post additional signs * * *."). The Court acknowledged the adverse effect on the "quality of life" and the "value of property" created by the proliferation of signs. *Id.* (The city's "interests are both psychological and economic. The character of the environment affects the quality of life and value of property in both residential and commercial areas."). Ladue, therefore, has the right to prevent the proliferation of signs and the resulting

visual blight that plague many municipalities of St. Louis County as well as many cities throughout the country. J.A. 154-155, Drummond Aff. ¶¶ 79-81, J.A. 178-179, Spink Aff. ¶¶ 86-88.

C. Ladue's Sign Ordinance Is Content-Neutral.

The Court in *Ward* defined the meaning of a "content-neutral" governmental regulation as follows: "[t]he government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others [citation omitted]. Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" 491 U.S. at 791 (quoting *Community For Creative Non-Violence*, 468 U.S. at 293 (emphasis added in *Ward*)).

Ladue's sign ordinance is "justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791. The ordinance contains a detailed legislative declaration of "Findings, Policies, Interests, and Purposes," which demonstrate Ladue's comprehensive commitment to the beautification of its City since it was formed in 1936. J.A. 116-119. The declaration explains the content-neutral reasons for Ladue's decision to prohibit all signs with the limited exception of those that do not proliferate or affect safety. *Id.*

The purposes of the ordinance are supported by the uncontested affidavit of Malcolm C. Drummond, a nationally renowned land-use expert. Drummond testified that if Ladue had not enacted New Chapter 35, signs would proliferate in the City and create visual blight, safety problems, and a deterioration of real estate values. J.A. 154-155, Drummond Aff. ¶¶ 77-90.

The courts below misunderstood and misapplied this Court's holding in *Ward*. The District Court attempted to distingiush *Ward* as follows: "Unlike the regulation in *Ward* that sought only to regulate the volume of the protected speech, not the content or even the specific

mix of the music, New Chapter 35 specifically looks to the content to identify exceptions to a general prohibition of all signs." Pet. App. 16a.

The District Court's opinion is contradicted by this Court's analysis in *Ward*. The Court acknowledged that volume is part of the content of musical expression and indeed is a key component of one's First Amendment right to express rock music. 491 U.S. at 786 n.1. Even though New York City's ordinance restricted a rock musician's First Amendment right by allowing the City's sound technician to regulate the volume of the music, the Court upheld the ordinance because it was justified by the content-neutral reason of maintaining a quiet environment in nearby residential neighborhoods. *Id.* at 792.

The Eighth Circuit confused *Ward's* analysis of "content-neutrality" with the "secondary effects" doctrine, which permits certain content-based regulations of speech. Pet. App. 5a-6a. *See R.A.V.*, 112 S. Ct. at 2546; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986).

The Court of Appeals erred further in ignoring this Court's holding in *R.A.V.*, 112 S. Ct. at 2545-2546 (1992). There, the Court stated that the central principle underlying its First Amendment doctrine is that the government may not proscribe speech "*because* of disapproval of the ideas expressed." *Id.* at 2542 (emphasis added). An important corollary of this doctrine is that the government may proscribe speech for significant reasons that are unrelated to the content of speech. *Id.* at 2544, 2547.

The Court in *R.A.V.* explained that the government has the power to regulate a noncontent element of speech. 112 S. Ct. at 2544. A "noisy sound truck," therefore, is "as Justice Frankfurter recognized, a 'mode of speech,'" that does not have a "claim upon the First Amendment." *Id.* at 2545 (citation omitted).[4] Ladue's regulation of

[4] Justice Stevens agreed with the majority on this issue. He observed that "[i]t is true that loud speech in favor of the Republi-

the medium of signs is permissible because it furthers the government's content-neutral purpose of preventing the nuisance of "visual noise" created by sign proliferation. *See Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (plurality opinion) (affirming validity of ordinance banning sound trucks based upon individual's right of privacy and right to be free from loud noise), 366 U.S. at 96-97 (Frankfurter, J., concurring) (same), 366 U.S. at 97 (Jackson, J., concurring) (same).

Consistent with the principles of content-neutrality explained in *Ward* and *R.A.V.*, the Court in *Discovery Network* stated that a city must establish a "neutral justification" to support the constitutionality of an ordinance designed to prevent visual blight caused by too many newsracks. 113 S.Ct. at 1515, 1517. Sign proliferation causing visual blight and safety problems are content-neutral reasons that justify Ladue's ordinance.

Respondent attempted to contest the neutral justification for Ladue's sign ordinance by filing the affidavit of Nancy Sachs, a Ladue resident who feels that even if New Chapter 35 did not exist, signs would not proliferate in the City. J.A. 190-192, Sachs Aff. This Court should disregard Sachs' inadmissible and legally irrelevant affidavit.

Fed. R. Civ. P. 56(e) states that affidavits "shall show affirmatively that the affiant is competent to testify to the matters stated therein." An affidavit must be based upon admissible evidence and not upon conjecture. *Id.* In reviewing an expert's affidavit, the Court must apply the Federal Rules of Evidence to determine whether the contents of the affidavit would be admissible at trial. *See, e.g., Washington v. Armstrong World Industries, Inc.*, 839 F.2d 1121, 1123-1124 (5th Cir. 1988). Applying these

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can Party can be regulated because it is loud, but not because it is pro-Republican; and it is true that the public burning of the American flag can be regulated because it involves public burning and not because it involves the flag." *R.A.V.*, 112 S. Ct. at 2562 (Stevens, J., dissenting).

standards to Sachs' affidavit, this Court should refuse to consider the affidavit based upon Fed. R. Evid. 702 and 703 (requiring an expert to be qualified and to base opinion on data reasonably relied upon by experts). Sachs does not claim to have any expertise or experience in land-use, city planning, or municipal government. J.A. 190-192, Sachs Aff.

If this Court were to consider Sachs' affidavit, it does not establish respondent's right to a summary judgment. In reviewing the grant of summary judgment to respondent, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The lower courts, therefore, were required to accept as true the facts and opinions contained in Drummond's and Spink's affidavits, which support the constitutionality of Ladue's sign ordinance.

Furthermore, the lower courts erred in not holding that Ladue is entitled to summary judgment. Sachs does not contest any of the facts established by Drummond and Spink that the proliferation of signs and the resulting visual blight have occurred in many cities near Ladue. In addition, Sachs' affidavit does not create a factual dispute that is outcome-determinative under the controlling law of *Vincent, Renton*, and *Ward*. *See Anderson*, 477 U.S. at 251-255 (summary judgment should be granted if nonmovant's evidence is "of insufficient caliber or quantity" to create a factual dispute). The opinion of a single resident of Ladue cannot be permitted to upset the considered judgment of a city's legislative body. *Ward*, 491 U.S. at 800-801.

An additional example of respondent's effort to inject legally irrelevant material into this case involves her interpretation of some testimony on Ladue's predecessor sign ordinance that has been repealed and is not at issue before this Court. J.A. 26-37, Old Chapter 35 (repealed January 21, 1991). The dispute concerns the answers of Mayor Spink and Councilman Remington to hypothetical

questions about the "variance clause" in Ladue's predecessor sign ordinance. J.A. 28, Old Chapter 35, § 35-5. Respondent interpreted the variance clause to give the City Council discretion to permit signs based on their content. Even if one accepted respondent's interpretation of the clause, it is legally irrelevant because New Chapter 35, the sign ordinance at issue, repealed the variance provision in Old Chapter 35. In addition, Mayor Spink and Councilman Remington did not participate in the City Council's vote on New Chapter 35. J.A. 162, 180, 181, Spink Aff. ¶¶ 11-13, 95, 98.

Ladue's new sign ordinance does not give the members of the City Council, the Mayor, City officials, employees, or residents any discretion to permit signs based on their content. J.A. 116-131 (text of New Chapter 35). Furthermore, unlike Ladue's predecessor sign ordinance, Chapter I of New Chapter 35 contains a complete "Declaration of Findings, Policies, Interests, and Purposes" that explains the reasons for Ladue's general prohibition of signs and the City's justification for each of the limited exceptions. J.A. 116-119. Respondent should not be permitted to attack Ladue's new sign ordinance by offering her interpretation of the legally irrelevant testimony of Mayor Spink, Councilman Remington, Police Chief Dierberg, and Willow Hill residents Arnold and Gulick concerning their opinions of legislative purpose of Ladue's Old Chapter 35 that has been repealed.

The challenged testimony has no legal relevance to respondent's constitutional challenge of New Chapter 35, which is facially constitutional and, like all of Ladue's predecessor sign ordinances, has never been applied in an unconstitutional fashion. The Court has held that "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Moreover, the Court accepts the recitation of purposes contained in a municipal ordinance. *Frisby v. Schultz*, 487 U.S. 474, 477 (1988) (purpose of ordinance was reflected in its

text). This principle is particularly applicable when a city repeals a predecessor ordinance of questionable constitutional validity. *See id.* If the rule were otherwise, a city never could repeal old ordinances with the assurance that the courts would enforce the constitutionality of the new ordinance based on its text and the manner in which it is applied.

D. The Exceptions In Ladue's Sign Ordinance Are Content-Neutral Because They Permit Only Those Signs Which Do Not Proliferate Or Which Affect Safety.

Ladue's sign ordinance satisfies the ultimate test in *R.A.V.* that a governmental regulation is valid if it is not "conditioned upon the sovereign's agreement with what a speaker may intend to say." *R.A.V.*, 112 S. Ct. at 2547 (quoting *Metromedia*, 453 U.S. Ct. 555 (Stevens, J. dissenting in part) (citation omitted)). The exceptions contained in New Chapter 35 are not based on whether the City agrees or disagrees with the viewpoint, subject matter, or content of a sign's message.

While Ladue's sign ordinance generally prohibits the medium of signs, it allows as much speech as possible through signs without adversely affecting Ladue's significant governmental interests. Ladue's sensitivity to the right of free speech under the First Amendment is reflected in its narrowly tailored exceptions to its general prohibition of signs. J.A. 121-122, New Chapter 35, § 35-4.

All of the permitted signs (with the exception of residence identification and municipal signs [5] that are directly related to the protection of the public safety) are naturally limited in number. J.A. 116-119, New Chapter 35, Article I. Ladue is able to permit these signs for the content-neutral reason that their allowance and limited number would not result in proliferation contrary to the purpose of the ordinance. *Id.*

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[5] Municipal signs, such as those that state "No Parking" or "Speed Limit: 20 Miles Per Hour," are enacted by the City to provide notice of applicable laws.

E. The Lower Courts Relied On Portions Of The Plurality Opinion In *Metromedia v. City Of San Diego*, 453 U.S. 490 (1981), Which Conflict With This Court's Test For Determining Whether A Governmental Regulation Is Content-Neutral.

The Eighth Circuit and the District Court relied on the plurality opinion in *Metromedia* in holding that Ladue's sign ordinance was unconstitutional. Pet. App. 3a-4a (Eighth Circuit opinion), Pet. App. 16a-17a, 25a-29a (District Court opinion). According to the courts below, the exceptions in Ladue's sign ordinance implicitly mean that "the city was improperly choosing the appropriate subjects for public debate." Pet. App. 4a (quoting *Metromedia*, 453 U.S. at 514-515)) (Eighth Circuit opinion), Pet. App. 26a (District Court opinion).

1. *The Lower Courts Erred In Concluding That Ladue's Sign Ordinance Discriminates In Favor Of Selected Types Of Commercial And Noncommercial Speech.*

The assumption underlying the *Metromedia* plurality's implied discrimination theory was that San Diego failed to explain the reason its decision to exclude some types of signs from its general prohibition of signs advanced its goals of aesthetics and safety. 453 U.S. at 513, 514 ("The city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city. * * * No other commercial or ideological signs meeting the structural definition are permitted, regardless of their effect on traffic safety or esthetics.").

Ladue's sign ordinance is distinguishable from the San Diego ordinance that was criticized by the *Metromedia* plurality. Unlike San Diego's ordinance, Ladue's ordinance provides a sound and reasonable content-neutral explanation for its allowance of certain signs. Ladue only permits signs that do not proliferate because they are naturally limited in number, by function or location, or signs that protect the public safety.

The District Court failed to recognize that Ladue's sign ordinance is distinguishable in this respect from San Diego's billboard ordinance. The Court of Appeals appears to have rejected or misunderstood the neutral justification for Ladue's sign ordinance which was supported by a substantial uncontested evidentiary record filed in the summary judgment proceedings. See Pet. App. 5a-6a.

A careful analysis of the language in the Eighth Circuit's opinion discloses that the Eighth Circuit's position is erroneous as a matter of law. Pet. App. 5a-6a. In a footnote to the text of the opinion, the Eighth Circuit panel acknowledged Ladue's justification for its ordinance is to prohibit the proliferation of signs. ("According to Ladue, the ordinance excepts from the general ban only signs that are naturally limited in number or that are necessary to protect the safety of Ladue's residents."). Pet. App. 6a n.7. The court, nevertheless, concluded that Ladue "has failed to provide sufficient factual support for this proliferation rationale." *Id.*

The Eighth Circuit's first error of law was its failure to consider as a relevant factor the undisputed factual foundation for Ladue's nonproliferation justification for its ordinance. *See* J.A. 116-119. In addition, contrary to the well accepted law on the standard of review in summary judgment proceedings and "time, place, or manner" regulations of speech, the court, in effect, disregarded the uncontested affidavits of Malcolm Drummond and Mayor Spink as insufficient "factual support." These affidavits establish that there was a serious danger of sign proliferation which would upset Ladue's historic commitment to the beautification of its small, residential community. *See Vincent*, 466 U.S. at 795 (reversing the Court of Appeals' rejection of the "sufficiency" of the City's justification for its ban on signs).

By failing to discuss the evidentiary record supporting Ladue, the Eighth Circuit violated the standard of review under which the ordinance should be analyzed. In *Renton*, 475 U.S. at 51-52, the Court held that "[t]he

First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce new evidence of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." In *Ward*, 491 U.S. at 800, this Court further refined the standard of review by underscoring a court's duty to defer to a city's reasonable judgment as to the best way of protecting the welfare of its residents.

The Court's most significant legal error is its failure to recognize that each of the permitted signs is justified by the test of whether they "contribute substantially to the public safety and welfare or, because of their limited number, location, and size, do not substantially impinge upon the City of Ladue's interest in privacy, aesthetics, safety, and maintenance of property values so as to necessitate a total ban of all signs." J.A. 119, New Chapter 35, Declaration of Findings, Policies, Interests, and Purposes. An examination of the exceptions shows that the reasons for their allowance in each category satisfy a content-neutral purpose.

The District Court determined that Ladue's sign ordinance was unconstitutional because it permitted "for sale" and "for lease" signs. The court overlooked two content-neutral justifications for this exception stated in Article I of the sign ordinance. J.A. 110. First, Mo. Rev. Stat. § 67.317 (1986), requires municipalities to permit for sale and for lease signs. A city cannot be charged with discriminating in favor of signs required by state law. *See Metromedia*, 453 U.S. at 554 n.25 (Stevens, J., dissenting in part) (signs required by law are content-neutral because they are not based on the "subject matter of speech"). Second, the limited number of homes for sale or for lease at any given time prevent their proliferation. J.A. 118.

In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93-95 (1977), the Court overturned a municipal ordinance that banned for sale signs because

the City hoped to discourage white homeowners from leaving a racially integrated neighborhood. The Court concluded that the City was trying to suppress the message on the signs and was not genuinely concerned with the effect of signs on the aesthetics of the community. *Id.* at 93-94. The Court reserved the question of "whether a ban on signs or a limitation on the number of signs could survive constitutional scrutiny if it were unrelated to the suppression of free expression." *Id.* at 94 n.7.

Observing that signs are the ideal manner in which to communicate the sale of real estate, the Court stated that "serious questions exist as to whether the ordinance 'leave[s] open ample alternative channels for communication [citation omitted].' " *Id.* at 93. Ladue's ordinance is also justified on the grounds that it prohibits off-site signs that proliferate and permits on-site signs that are limited in number and are necessary to identity the premises or the activities conducted on the premises. Ladue's exception for real estate signs would be consistent with this content-neutral rationale because these signs directly relate to the ownership or occupancy function of the real estate on which the sign is located.

The Eighth Circuit concluded Ladue's sign ordinance was content-based because it permitted some commercial signs in districts zoned for commercial or industrial use and announcement signs at schools and churches. Pet. App. 6a n.7. The court overlooked the fact that these types of signs cannot proliferate because of the limited number of commercial businesses in the small areas of Ladue zoned for commercial and industrial use (3% of the entire geographic area), the site-specific function of the signs, and the relatively few schools and churches in the City.

Ladue interprets the exception for commercial signs in the areas zoned for commercial and industrial use to apply only to commercial signs that identify the premises or that are directly related to activities conducted on

the premises.[6] The word "commercial" is the technical term designating the zoning classification of property in the commercial and industrial zoning districts.

Ladue's zoning ordinance creates zoning districts that are either residential or nonresidential. J.A. 145, Drummond Aff. ¶ 33 Ex. F (Ladue's zoning ordinance, § III). The nonresidential zones are the small commercial and industrial districts. *Id.* The permitted uses for the commercial and industrial zones include offices and stores. *Id.*

A "commercial" sign, therefore, identifies the occupant or directly relates to the activity taking place on the property zoned for commercial and industrial use. For example, a store might have an identification sign, "Joe's Meat Market," and a functional sign, "Steaks on Sale." Similarly, an office might have an identification sign, "Washington for President Campaign Headquarters," and a functional sign, "Campaign Committee Meeting Here at 7:00 p.m." Neither the store nor the offce, however, could have a noncommercial sign such as "Vote for NAFTA" or "Elect Washington on November 2nd," which is not either an identification of the occupant or of an activity taking place on the premises.

The Court of Appeals failed to consider the importance of the neutral factors of the *location* and *function* of each of the permitted signs in Ladue's ordinance. These factors are important because signs that must directly relate to identification of a specific "on-site" occupant or activity cannot proliferate to other locations. *See Heffron v. Inter-*

[6] This Court traditionally accepts a city's construction of its ordinances. *Frisby v. Schultz*, 487 U.S. 474, 482 (1988). The Court also narrowly interprets state laws to "avoid[] constitutional difficulties." *Id.* These rules are particularly applicable to Ladue's ordinance which states: "[T]he City of Ladue opposes discrimination based upon the content of any lawful speech or expression and that the provisions of this chapter are not intended and shall not be interpreted so as to permit any such determination." J.A. 119, New Chapter 35, Declaration of Findings, Policies, Interests, and Purposes.

national Society For Krishna Consciousness, 452 U.S. 640, 654 (1981) (upholding rule of state fair committee that limited distribution, sales and solicitation activities to fixed locations).

The Eighth Circuit failed to appreciate the distinction between on-site signs that do not proliferate and off-site signs that do proliferate. *See* J.A. 116-119, New Chapter 35, Declaration of Findings, Policies, Interests, and Purposes (recognizing location and function of signs as justifications for Ladue's ordinance). Moreover, if the small number of commercial establishments, schools, and churches in Ladue were not able to have signs that allowed them to identify their location and activity on the site, their ability to function would be handicapped severely because of the public's reliance on such signs as a primary source of information about the site. Ladue may be required to allow these signs under this Court's "time, place, or manner" test because there may be no adequate and ample alternative modes of expression for the owners or occupants of space in these small areas of the City.

The Eighth Circuit did not address the constitutional problem created by its holding that Ladue's ordinance discriminated against noncommercial speech. If political or other noncommercial signs, for example, must be allowed in areas zoned for commercial and industrial use, those few property owners or occupants could dominate the political or social debate in Ladue to the unfair disadvantage of all owners or occupants of residential property who were not permitted to erect such signs. As the Court observed in *Vincent*:

> [N]or is it clear that some of the suggested exceptions [to a prohibition of political signs] would even be constitutionally permissible. For example, even though political speech is entitled to the fullest possible measure of constitutional protection, there are a host of other communications that command the same respect. An assertion that "Jesus Saves," that

> "Abortion is Murder," that every women has the "Right to Choose," or that "Alcohol Kills," may have a claim to a constitutional exemption from the ordinance that is just as strong as "Roland Vincent—City Council." [citation omitted]. To create an exemption for appellees' political speech and not these other types of speech might create a risk of engaging in constitutionally forbidden content discrimination. [citation omitted]. Moreover, the volume of permissible postings under such a mandated exemption might so limit the ordinance's effect as to defeat its aim of combatting visual blight.

466 U.S. at 816. *See also Metromedia,* 453 U.S. at 568 n.9 (Burger, C.J., dissenting) ("If a city were to permit on-site noncommercial billboards, one can imagine a challenge based on the argument that this favors the views of persons who can afford to own property in commercial districts.").

Furthermore, there are content-neutral reasons for the exceptions in Ladue's ordinance for on-site or safety related noncommercial signs such as subdivisions and residence identification signs, road and driveway signs for danger, direction, or identification, safety hazard signs, and signs for public transportation stops. *See* J.A. 116-119. The Court of Appeals had no valid basis for its unexplained conclusion that Ladue's allowance of these types of signs indicates that the ordinance "favors certain types of noncommercial speech over others." Pet. App. 4a. The District Court also had no principled basis for its holding that by permitting these noncommercial signs, Ladue was controlling the political and social debate within the City. Pet. App. 28a.

2. *This Court Should Expressly Reject The Metromedia Plurality's "Implied Discrimination" Theory Because It Prevents Local, State, And Federal Governmental Authorities From Enacting Laws Designed To Prevent Visual Blight And Other Evils Caused By A Proliferation Of Signs.*

The Eighth Circuit's opinion brings into sharp focus the theoretical and practical problems that have plagued the *Metromedia* plurality's "implied discrimination" theory for over a decade. Former Chief Justice Burger expressed the dilemma as creating a "series of Hobson's choices" for all cities that desire to regulate the placement of signs and billboards. *Metromedia,* 453 U.S. at 569. The Chief Justice observed that "American cities * * * must, as a matter of *federal constitutional law,* elect between two unsatisfactory options: (a) allowing all "noncommercial" signs, no matter how many, how dangerous, or how damaging to the environment; or (b) forbidding signs altogether." *Id.* at 556 (Burger, C.J., dissenting) (emphasis in original).[7] *See also id.* at 540, 555 (Stevens, J., dissenting in part) (agreeing with the opinion of Burger, C.J.); *id.* at 569 (Rehnquist, J., dissenting) (agreeing substantially with the opinion of Burger, C.J.).

This Court should reject the *Metromedia* plurality's implied discrimination theory that has never gained the support of the majority of the Justices on this Court. See *Scadron v. City of Des Plaines,* 734 F. Supp. 1437 (N.D. Ill. 1990), *aff'd,* 989 F.2d 502 (7th Cir. 1993) (analyzing each of the opinions in *Metromedia* and concluding that the plurality's implied discrimination theory has no

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[7] Leading academic commentators agree with Chief Justice Burger's conclusion. *See, e.g.,* Daniel R. Mandelker & William R. Ewald, *Street Graphics and the Law* 190 (revised ed. 1988) (criticizing the *Metromedia* plurality's opinion "because it places municipalities in an impossible situation"). *See also* Daniel R. Mandelker, Jules B. Gerard & E. Thomas Sullivan, *Federal Land Use Law* § 7.02 at 7-12 (1993) (*Metromedia* "seems to have been undercut, if not implicitly overruled, by *Vincent.*").

value as precedent because it was rejected by a majority of the Court).

More than ten years ago, Justice (now Chief Justice) Rehnquist predicted that the *Metromedia* opinion would be viewed by "city planning comissions and zoning boards [who] must regularly confront constitutional claims of this sort * * * [to] be a virtual Tower of Babel, from which no definitive principles can be clearly drawn." 453 U.S. at 569 (Rehnquist, J., dissenting).

Experience has proved that Chief Justice Rehnquist's prediction has come true. While this Court has announced significant changes in the test for "time, place, or manner" regulations of speech, *see, e.g., Ward,* 109 S. Ct. at 2754-2760, the lower courts continue to apply rigidly the outdated plurality opinion in *Metromedia.*[8]

The severe hardship to cities that has been created because of the doctrinal confusion among the lower courts is exemplified by a recent Fourth Circuit case, *Arlington County Republican Committee v. Arlington County, Virginia,* 983 F.2d 587 (4th Cir. 1993). There, a divided panel held that a county's limit of two signs on residential, private property infringed speech by preventing multiple signs for multiple candidates. 983 F.2d at 594. *See also* Pet. for Cert. 21-22 (collecting cases reflecting conflict and confusion in the Courts of Appeals). Unless the trend in the lower courts is reversed, the residents of Arlington County, Virginia, Ladue, Missouri, and many

[8] *R.A.V.* signalled this Court's disagreement with the reasoning of the lower courts that Ladue discriminated against noncommercial speech becasue of the exceptions in its ordinance. *R.A.V.* held that exceptions are permitted as long as the "selectivity of the restriction is [not] even arguably 'conditioned upon the sovereign's agreement with what a speaker may intend to say.'" 112 S. Ct. at 2547 (quoting *Metromedia,* 453 U.S. 490, 55 (Stevens, J., dissenting in part) (citation omitted)). Justice Stevens' dissent in *Metromedia,* which would support the constitutionality of Ladue's sign ordinance, has now overtaken *Metromedia*'s plurality opinion. The lower court opinions have lost their intellectual foundation and, therefore, should be reversed.

other cities throughout the United States will be compelled, as a matter of federal constitutional law, to live with visual blight created by the proliferation of signs in their communities.

3. *The Lower Courts' Opinions, Which Are Premised On The Erroneous Principle That Noncommercial Speech Deserves Greater Constitutional Protection In This Case Than Commercial Speech, Conflict With The Reasoning Of City of Cincinnati v. Discovery Network, Inc., —— U.S. ——, 113 S. Ct. 1505 (1993).*

An assumption of the plurality opinion in *Metromedia,* on which the Eighth Circuit and the District Court principally rely, is that "noncommercial speech is accorded greater protection under the First Amendment than is commercial speech." *Metromedia,* 453 U.S. at 513; Pet. App. 26a (District Court opinion), Pet. App. 4a & cases cited therein (Eighth Circuit opinion).

The Eighth Circuit's and the District Court's opinions conflict with *Discovery Network,* 113 S. Ct. at 1515. There, the Court held that a Cincinnati ordinance prohibiting newsracks containing commercial newspapers was unconstitutional because it "attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech." 113 S. Ct. at 1511.

In contrast to Cincinnati's newsrack ordinance, Ladue's sign ordinance is not based on an erroneous constitutional distinction between noncommercial and commercial speech. Ladue prohibits all noncommercial and commercial signs that proliferate and cause visual blight, or that cause safety hazards. To the extent that signs do not proliferate, or affect public safety, they are permitted.

The *Discovery Network* Court concluded that Cincinnati's ordinance, which was premised on the distinction between commercial and noncommercial speech, "bears

no relationship *whatsoever* to the particular interests [of aesthetics and safety] that the city has asserted." 113 S. Ct. at 1514 (emphasis in original). On the other hand, the guiding principle of Ladue's sign ordinance—whether the signs are likely to proliferate or affect safety—directly relates to the City's interest in preventing visual blight and the deterioration of real estate value while also protecting the safety of the residents.

F. Even If One Assumes That Ladue's Sign Ordinance Regulates The Content Of Speech, The Ordinance Is Constitutional Because Its Purpose Is To Prevent The "Secondary Effects" Of Signs—Visual Blight, Safety Problems, And Impairment Of Real Estate Values.

In *R.A.V.*, the Court articulated the secondary effects doctrine as follows: "Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular "secondary effects" of the speech, so that the regulation is 'justified without reference to the content of the . . . speech.'" 112 S. Ct. at 2546 (emphasis in original) (citations omitted).

The Court in *Renton* upheld a zoning ordinance that prohibited an adult movie theater from operating in a residential community. 475 U.S. at 49. It was clear that "the ordinance treats theaters that specialize in [non-obscene] adult films differently from other kinds of theaters." 475 U.S. at 47. Nevertheless, the Court upheld the ordinance because it was justified by the content-neutral "secondary effects" of speech—prevention of crime, preservation of real estate values, and protection of the quality of urban life for families with children—and not the content of speech. *Id. See also Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2468, 2469 (1991) (Souter, J., concurring) (upholding Indiana's statute that prohibited totally nude dancing as adult entertainment because the ordinance was justified by the content-neutral secondary

effects of speech—the prevention of prostitution, sexual assault, and other criminal activity).

The Eighth Circuit misapplied the secondary effects doctrine, concluding that the doctrine was "inapposite" and that Ladue's sign ordinance was unconstitutional. Pet. App. at 5a-6a. The court's holding is flatly contradicted by the unambiguous language of the sign ordinance and the uncontroverted evidence in the summary judgment record that sign proliferation causes visual blight and other problems. Ladue's ordinance is justified because the City has the right to prevent the content-neutral secondary effects of the proliferation of signs—visual blight, safety problems, and the deterioration of real estate values.

G. Ladue's Sign Ordinance Is "Narrowly Tailored" Because It Directly And Effectively Prevents Visual Blight Within The City.

In *Ward*, this Court held that "the requirement of narrow tailoring is satisfied " 'so long as the * * * regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" 491 U.S. at 799 (citation omitted). The Court held further that a "regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800. Courts must give deference to the reasonable judgment of local legislators who enact laws to protect the residents of cities throughout the country. *Id.* at 801.

Federalism concerns underlie the Court's rejection of a test that would compel a city to prove that its regulation was the least restrictive alternative available. As the Court observed in *Ward*, "The Court of Appeals erred in failing to defer to the city's reasonable determination that its interest in controlling volume would be best served by requiring Bandshell performers to utilize the city's sound technician." 491 U.S. at 800. *See also Discovery*

Network, 113 S. Ct. at 1525 (Rehnquist, C.J., dissenting) (" '[L]ittle can be gained in the area of constitutional law, and much lost in the process of democratic decision making, by allowing individual judges in city after city to second-guess . . . legislative . . . determinations' on such matters as esthetics.") (quoting *Metromedia*, 453 U.S. at 570 (Rehnquist, J., dissenting)).

Ladue's sign ordinance satisfies the "narrow tailoring" test in *Ward*. By limiting the number of signs permitted in Ladue, the ordinance directly addresses the source of the "evil" created by a proliferation of signs—visual blight, safety problems, and deterioration of real estate values. *Ward*, 491 U.S. at 800; *Frisby v. Schultz*, 487 U.S. 474, 485 (1988); *Vincent*, 466 U.S. at 808. Without the ordinance, Ladue's important governmental interests would be substantially impaired and would "be achieved less effectively." *Ward*, 491 U.S. at 799.

The problem that Ladue faces is not confined to respondent's yard and window signs. If Ladue permitted those signs, it would be compelled to allow all signs containing noncommercial speech. The central problem confronting Ladue is the proliferation of signs that would ensue in the absence of New Chapter 35. *See* J.A. 154-158, Drummond Aff. ¶¶ 78-97 (discussing evidence of sign proliferation in municipalities in St. Louis County and explaining the manner in which Ladue's sign ordinance prevents the deleterious effects of this proliferation). As the Court concluded in *Ward*, "[T]he validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." 491 U.S. at 801. *See also Hodgkiss*, 565 A.2d at 1064 (opinion of Souter, J.).

While signs are generally prohibited in New Chapter 35, a limited number of signs are permitted. J.A. 121-122, New Chapter 35, § 35-2, § 35-4. The Declaration of Findings, Policies, Interests, and Purposes in Ladue's sign ordinance explains the reasons underlying the City's

careful and narrow tailoring to achieve its objecitves without unnecessarily restricting speech through the medium of signs. J.A. 116-119. The ordinance reflects Ladue's sensitivity to *Ward*'s admonition that "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." 491 U.S. at 799.[9] *See also id.* at 800 n.7 ("The guideline does not ban all concerns, or even all rock concerts, but instead focuses on the source of the evils the city seeks to eliminate—excessive and inadequate sound amplification—and eliminates them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils. This is the essence of narrow tailoring.").

Furthermore, Ladue's sign ordinance satisfies each of the constitutional criteria for "narrow tailoring" discussed by the Court in *Discovery Network*.[10]

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[9] Respondent has an exceedingly high burden to meet in arguing that Ladue's sign ordinance is overbroad. As the Court observed in *Vincent*, "The concept of "substantial overbreadth" is not readily reduced to an exact definition. It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. * * * In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." 466 U.S. at 800-801. *See also Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (referring to the doctrine's "strong medicine").

[10] The Court in *Discovery Network* reviewed Cincinnati's ban of commercial newsracks under the test in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 563 (1980). This Court has used the *Central Hudson* test to evaluate governmental regulations of commercial speech. In *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 477 (1989), the Court observed that the test for reviewing regulations of commercial speech is "substantially similar" to the Court's "time, place, or manner" test for reviewing regulations of noncommercial speech. *See Discovery Network, Inc.*, 113 S. Ct. at 1525 (Rehnquist, C.J., dissenting) (opining that "time, place, or manner" test is duplicative of *Central Hudson* test). *See also id.* at 1510 n.11 (reserving question of whether regulations of commercial speech,

First, unlike Cincinnati's old ordinance that was enacted before newsracks created an aesthetic problem, Ladue's New Chapter 35 was enacted to address current visual blight and safety problems caused by the proliferation of signs. 113 S. Ct. at 1510.

Second, the Court characterized the Cincinnati ordinance as having a "paltry" or "minute" effect on reducing the total number of newsracks and, as a result, the ordinance did not address the problem of visual blight. In contrast, Ladue's sign ordinance prevents the problem of visual blight by prohibiting the vast majority of signs in the City. *Id.*

Third, whereas Cincinnati could have remedied its aesthetic problem by regulating the "size, shape, appearance, or number" of newsracks, these alternatives would not resolve the problem that Ladue faces as a result of an inevitable proliferation of signs that would occur absent its ordinance. *Id.* Ladue already regulates the size and number of the few signs that are permitted so that the aesthetics of the community will be maintained. These regulations, however, are not adequate to address the problem caused by the erection of multiple signs throughout Ladue.

As the Court observed in *Vincent*, "the substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself." *Vincent*, 466 U.S. at 810. Thus, "[b]y banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy." 466 U.S. at 808.

The definition of "sign" is another instance of the City's careful balancing in the ordinance. Ladue prohibits only those modes of speech that it has reasonably concluded create a risk of proliferation and visual blight.

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which are not "aimed at either the content of the speech or the particular adverse effects stemming from that content," are entitled to "more exacting" review).

In her Reply Brief filed in the District Court on the cross-motions for summary judgment, respondent argued for the first time that Ladue's sign ordinance was overbroad because, according to her construction of the ordiance, the definition of sign includes a flag. Reply Br. at 8-9. Contrary to respondent's erroneous construction of New Chapter 35, the definition of "sign" expressly includes "banners" and "pennants," but not "flags." J.A. 119-121, New Chapter 35, § 35-1.

This Court should not reach respondent's overbreadth claim because it was not pleaded properly and was not decided in the courts below. J.A. 22-25, 185-189, 113-115, Gilleo's Complaint, Second Amended Complaint, and Motion for Summary Judgment; 2A Jo D. Lucas, et al. *Moore's Federal Practice* 8-76 (1992-93 Supp.) ("The liberal practice under Rule 8(a)(2) does not permit a plaintiff to change the theory of the case at a late stage of the litigation.") (citing *Evans v. McDonald's Corp.*, 936 F.2d 1087 (10th Cir. 1991) (claim raised in opposition to summary motion was not properly before the District Court)). Even if the Court addresses the claim, however, it has no merit and should be rejected.

A "flag" is defined by the fabric material used in its construction and is typically square or rectangular shaped, although it is occasionally made in a different shape such as a swallowtail. *Webster's Third New International Dictionary* 862 (1963) (defining "flag" as "a usu[ally] rectangular piece of fabric"); *Webster's New World Dictionary* 529 (2nd College ed. 1979). Ladue defines "banner" based on its unique elongated rectangular shape; Ladue also defines "pennant" based upon its special shape—a rectangle tapered to a single point. *Webster's Third New International Dictionary* 173 (1963) (characterizing shape of banner by providing literary example of "welcoming banners stretched across the street"); *id.* at 1671 (defining shape of pennant as "tapering usu[ally] to a point); *Webster's New World Dictionary* 111, 1051 (2nd College ed. 1979).

Contrary to Gilleo's argument, Ladue has not created a content-based definition of "flag," "banner," or "pennant." Banners and pennants fall under the general prohibition of signs regardless of their commercial or noncommercial message. All flags, however, may be flown or displayed in Ladue regardless of their message as long as they are made of fabric and are not in the shape of a banner or pennant. Thus, for example, an American flag or a flag containing the messages contained on respondent's signs are not prohibited under Ladue's ordinance.

This Court traditionally narrowly construes state law to avoid constitutional problems and defers to a city's construction of its ordinance. *See Frisby v. Schultz*, 487 U.S. at 483 (accepting dictionary definition and city counsel's representation of the meaning of a municipal ordinance); *Ward*, 491 U.S. at 794 ("perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity"). Applying these principles to New Chapter 35, Ladue's sign ordinance is content-neutral and narrowly tailored.

H. Numerous Alternative And Ample Modes Of Speech Are Available For People to Express Themselves.

The summary judgment record is uncontested that there are numerous alternative and ample modes of speech available for people to express themselves other than through signs.[11] J.A. 158-159, Drummond Aff. ¶ 98 (re-

[11] This Court need not address this element of the *Ward* test because respondent did not contest the issue in the District Court or in the Court of Appeals prior to oral argument. Respondent, therefore, has waived any contention that no alternative modes of expression are available as the issue was not properly before the Eighth Circuit and is not before this Court. *See Jenkins v. Anderson*, 447 U.S. 231 234 n.1 (1980) (Court's refusal to consider issue raised by respondent that had not been preserved in courts below); *Federal Trade Commission v. Grolier, Inc.*, 462 U.S. 19 n.6 (1986) (same); *Jenkins v. Missouri*, 862 F.2d 762, 766 (8th Cir.), *cert. denied*, 113 S. Ct. 322 (1992) (Court of Appeals will not consider issue that was not raised in the District Court); *Westcott v. City of Omaha*, 901 F.2d 1486, 1490 (8th Cir. 1990) (Court of Appeals refused to consider issue raised in oral argument but not in the briefs).

viewing numerous alternatives), J.A. 182-183, Spink Aff. ¶ 104 (same). These modes of speech include letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings. *Id.* Respondent also may hold a sign while standing or sitting on her lawn as Ladue's sign ordinance only prohibits signs that are attached to the ground or to a structure on the ground. J.A. 119-121, New Chapter 35, § 35-1.

In *Vincent*, this Court held that political signs were not a unique medium of speech and that many alternatives existed for the expression of one's message:

> The Los Angeles ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited. To the extent that the posting of signs on public property has advantages over these forms of expression, [citation omitted], there is no reason to believe that these same advantages cannot be obtained through other means. To the contrary, the findings of the District Court indicate that there are ample alternative modes of communication in Los Angeles. Notwithstanding appellees' general assertions in their brief concerning the utility of political posters, nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication, or that appellees' ability to communicate effectively is threatened by ever-increasing restrictions on expression.

466 U.S. at 812. *See also Hodgkiss*, 565 A.2d at 1067 (opinion of Souter, J.) ("It is thus beyond doubt that the defendant and his associates had the unrestricted opportunity to solicit the attention of the same pedestrians to whom the sign was addressed, and there is no suggestion that restrictions imposed by the city or by any other

unit of government had the effect of limiting the access of would-be sign posters to any other conventional medium of communication.").

Weighing the competing governmental and individual interests at stake in this case, government's right to legislate for the general welfare should prevail. Individuals have numerous avenues of expression other than through signs. If, however, Ladue and other cities, States, and federal authorities cannot prevent the proliferation of signs, people throughout our country—in our residential neighborhoods, public places, parks, scenic areas, streets and highways—will be compelled to live with visual and urban blight.

II. LADUE HAS THE RIGHT TO REGULATE PRIVATE PROPERTY TO PREVENT THE NUISANCE OF VISUAL BLIGHT.

This Court has held that government may restrict the "time, place, or manner" of speech on private as well as public property. *Barnes*, 111 S. Ct. at 2460; *Renton*, 475 U.S. at 44, 46-48. Ladue, therefore, has the right to regulate respondent's use of her real property by prohibiting signs that can proliferate and cause visual blight. The Court should reject respondent's absolutist view of the First Amendment and her implicit challenge of traditional governmental land-use and zoning powers to abate nuisances such as visual blight if there is an incidental effect on speech.

Ladue's regulatory authority is rooted in the police powers which have been delegated traditionally to government and which allow zoning laws that are so important in urban planning. *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (State may exercise its police powers to protect the aesthetic qualities of its cities); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding the constitutionality of city's zoning laws regulating the use of private property).

Ladue's sign ordinance, designed to prevent visual blight that harms its natural landscapes and aesthetic ambience, stands on the same authority as state laws prohibiting individuals from creating nuisances on their private property. As the Court observed in *Euclid*, 272 U.S. at 388, "A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." The private, "residential character" of Willow Hill and indeed 97% of Ladue should "inform the application of the relevant test" for "time, place, or manner" regulations of speech. *Frisby*, 487 U.S. at 481.

In reviewing Ladue's sign ordinance, the Court should be sensitive to Ladue's right to protect the privacy interests of its residents and the natural charm of its beautiful residential areas. As Justice Stevens observed for the Court in *Vincent*, a city's interests in preventing visual blight caused by the proliferation of signs are both "psychological and economic" and are "presumptively at work in all parts of the city." 466 U.S. at 817.[12]

The Court in *Frisby*, 487 U.S. at 194, underscored the importance of residential privacy in the calculus of values that must be weighed in a "time, place, or manner" regulation of speech. Quoting from *Carey v. Brown*, 117 U.S. 455, 471 (1980), the *Frisby* Court observed: " 'The State's interest in protecting the well-being, tranquility,

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[12] In his dissenting opinion in *Metromedia*, Justice Stevens emphasized the right of a city to prevent the visual blight caused by a proliferation of signs in residential as well as commercial parts of the city. "It seems to be accepted by all that a zoning regulation excluding billboards from residential neighborhoods is justified by the interest in maintaining pleasant surroundings and enhancing property values. * * * The character of the environment affects property values and the quality of life not only for the suburban resident but equally so for the individual who toils in a factory or invests his capital in industrial properties." 453 U.S. at 552 (Stevens, J., dissenting in part).

and privacy of the home is certainly of the highest order in a free and civilized society. * * * [P]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.' " 487 U.S. at 484.

This Court should affirm Ladue's right to protect the privacy right of all of Ladue's residents to enjoy the beauty of their neighborhoods. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion) ("[T]he city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect.").

III. LADUE'S RIGHT TO REGULATE IS STRENGTHENED BECAUSE THE RESIDENTS OF LADUE ARE HELD "CAPTIVE" TO THE VISUAL BLIGHT CREATED BY THE PROLIFERATION OF SIGNS.

This Court has recognized the right of government to protect "captive audiences" from being subjected to unwanted speech that intrudes on their sense of privacy and well-being. The Court also should acknowledge Ladue's right to protect its "captive" residents from the ugly intrusion of visual blight created by a proliferation of signs.

In *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932), the Court upheld a statute that did not permit the advertising of cigarettes on billboards and street car placards. Writing for the Court, Justice Brandeis approved of the following observation of the state court that had initially upheld the statute: "Billboards, street car signs, and placards and such are in a class by themselves. * * * Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. * * * In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard." 285 U.S. at 110. The Court in *Lehman v. City of Shaker Heights*, 118

U.S. 298 (1974), upheld a city's right to prohibit political advertising and permit commercial advertising on its buses. Writing for the plurality, Justice Blackmun approved of Justice Brandeis' opinion in *Packer Corp.* and concluded that a city had the right to protect its "captive audience" from advertising that offended the city's goal of providing "convenient" and "pleasant" service to its customers. *Lehman*, 418 U.S. at 301-303; *see also* 418 U.S. at 306-308 (Douglas, J., concurring) (agreeing with "captive audience" theory).

In *Vincent*, when the Court upheld Los Angeles' ban on signs in public places, it relied on *Lehman* and its emphasis on protecting "unwilling viewers against intrusive advertising." 466 U.S. at 806; *see also R.A.V.*, 112 S. Ct. at 2568 (Stevens, J., dissenting) (quoting *Lehman* and emphasizing that "[t]he protection afforded expression turns as well on the context of the regulated speech"). In *United States v. Kokinda*, —— U.S. ——, 110 S. Ct. 3115, 3119 (1990), the Court again reaffirmed *Lehman* when it upheld a Postal Service regulation that prohibited solicitation on sidewalks near Post Offices.

Frisby reinforced the Court's protection of "captive" homeowners who have a right to be free from picketing that disturbs the "sanctity of the home." 487 U.S. at 484. The Court held that "[t]here is simply no right to force speech into the home of an unwilling listener." 487 U.S. at 485.

The ugliness that will be created by the proliferation of yard signs in Ladue's small, private residential streets would be apparent when one tries to enjoy a pleasant walk in one's neighborhood. The visual blight will also infiltrate one's home when one tries to relax and enjoy the scenic view of the trees, plants, and flowers in the yards near one's home. Ladue should be permitted to protect its captive residents from the ill effects of the sign pollution that threatens the beauty and natural settings in Ladue.

IV. LADUE'S EXTENSIVE SUMMARY JUDGMENT RECORD DEMONSTRATES THAT ITS SIGN ORDINANCE WOULD PASS JUSTICE BRENNAN'S AND JUSTICE BLACKMUN'S STRICT CONSTITUTIONAL TEST BECAUSE LADUE HAS MADE A "COMPREHENSIVE COMMITMENT" TO THE BEAUTIFICATION OF ITS UNIQUE CITY.

Justices Brennan and Blackmun criticized the *Metromedia* plurality's "implied discrimination" theory. They concurred in the Court's judgment but expressly rejected the "all or nothing" approach that characterizes the implied discrimination theory. Indeed, Justice Brennan went so far as to state that the plurality's view made "little sense." 453 U.S. at 532 n.10 (Brennan, J., concurring, joined by Blackmun, J.).

Justices Brennan and Blackmun would permit a prohibition of signs with narrowly tailored, content-based exceptions. 453 U.S. at 532, 532 n.10, 533. Before upholding such a prohibition, however, Justices Brennan and Blackmun would require the municipality to make a record that it is "seriously and comprehensively addressing aesthetic concerns * * *. *Id.* at 531. By showing a comprehensive commitment to making its physical environment in commercial and industrial areas more attractive, and by allowing only narrowly tailored exceptions, if any, San Diego could demonstrate that its interest in creating an aesthetically pleasing environment is genuine and substantial." 453 U.S. at 531, 532, 533. These Justices would require cities to establish a record of preserving aesthetics in areas that extended beyond sign control. *Id.*

Justices Brennan and Blackmun concluded that they had "little doubt" that some cities—such as the historic community of Williamsburg, Virginia [13]—could prove the

[13] The internationally famous landscape architect, Arthur A. Shurcliff, joined Ladue's planner, Harland Bartholomew, and other experts to restore the natural beauty and history of Williamsburg. *See* George H. Yetter, *Williamsburg Before and After* 67 (1993) (describing highlights of Shurcliff's work). *See also* J.A. 144, Drummond Aff. ¶ 29 Ex. E (discussing Bartholomew's work on the Williamsburg restoration project).

substantiality of their interest in aesthetics. 453 U.S. at 534. The City of Ladue is precisely the type of unique community—dedicated to furthering the goals of aesthetics and safety throughout its city—that can meet these strict constitutional standards under which a prohibition on signs with narrowly tailored exceptions would be permitted. The affidavits of Malcolm C. Drummond and Mayor Edith J. Spink, and the exhaustive set of exhibits in support of each affidavit, provide this Court with an extensive record of Ladue's extraordinary commitment to the aesthetics and preservation of its city through its sign ordinances, zoning laws, and award-winning beautification projects. *See* J.A. 138-159, Drummond Aff., J.A. 161-183, Spink Aff.

V. EVEN IF LADUE'S SIGN ORDINANCE IS DEEMED TO REGULATE THE CONTENT OF SPEECH, THE ORDINANCE SATISFIES THE COMPELLING STATE INTEREST TEST BECAUSE IT PERMITS AS MUCH SPEECH AS POSSIBLE WHILE ALSO PROTECTING LADUE'S RESIDENTS FROM THE EVILS OF SIGN PROLIFERATION.

Even if this Court concluded that Ladue's sign ordinance has "content-based" restrictions on speech and that the City could not satisfy the "secondary effects" test, the constitutionality of Ladue's ordinance should be upheld because the restrictions are "reasonably necessary to achieve * * * [Ladue's] compelling interests." R.A.V., 112 S. Ct. at 2550.[14]

Ladue's compelling state interests include the exercise of its police powers to achieve the purposes identified in its sign ordinance, its rights under the Tenth Amend-

[14] Presumably, the compelling state interest test is easier to meet than Justice Brennan's and Blackmun's strict standard because it would not require a city to make a record of a special and extraordinary commitment to beautification efforts. *See Metromedia*, 453 U.S. at 532 (Brennan, J., concurring, joined by Blackmun, J.).

ment, as well as Ladue's rights under the "liberty" and "property" clauses of the Fourteenth Amendment, to protect the quality of life of its residents by prohibiting signs that proliferate and diminish the value of real estate within the City. Ladue also has a compelling interest under the First Amendment in permitting as much speech as possible through the narrow exceptions in its ordinance that permit a limited number of signs. Ladue's compelling interests in aesthetics, privacy, safety, and the protection of real estate values justify the manner in which Ladue has regulated signs in New Chapter 35.

The Eighth Circuit stated without any explanation of evidentiary support from the record that "[w]e have no trouble concluding that Ladue's ordinance is not the least restrictive alternative." Pet. App. 7a. Respondent has not suggested a single alternative that is constitutional and that Ladue is not using already to prevent the proliferation of signs and the resulting visual blight.

VI. THE LOWER COURTS' OPINIONS JEOPARDIZE THE CONSTITUTIONALITY OF THE HIGHWAY BEAUTIFICATION ACT OF 1965.

The lower courts' "all or nothing," "implied discrimination" theory raises questions about the constitutionality of the federal Highway Beautification Act Of 1965 (hereinafter "Act"), 23 U.S.C.A. § 131 *et seq.* (West Supp. 1990). *See Metromedia,* 453 U.S. at 515 n.20 (reserving question concerning the constitutionality of the Act).

The purpose of the Act is to regulate signs and billboards adjacent to the interstate highway system "to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C.A. § 131(a). The Act contains a list of exceptions to its general ban of signs within the regulated area. These exceptions permit signs that include:

1. "directional and official signs;"
2. signs "advertising sale or lease of the property upon which they are located;"

3. signs "advertising activities conducted on the property on which they are located;"
4. "landmark signs * * * of historic or artistic significance;" and
5. signs "advertising distribution by nonprofit organizations of free coffee to individuals traveling" on the highways.

23 U.S.C.A. § 131(c) (West Supp. 1990).

Based upon the lower courts' theory, one could argue that the limited number of signs that are permitted under the Act reflects Congress' implied intent to discriminate against political and other forms of noncommercial speech that are prohibited under the federal legislation. On the other hand, like Ladue's sign ordinance, the Act would pass the "time, place, or manner" test under *Ward, R.A.V.,* and *Vincent.* The exceptions in the statute reflect the content-neutral purposes or justifications for the Act—preservation of the natural scenic beauty of the landscape, safety, and protection of the "public investment" in the highway system. Moreover, like Ladue's ordinance, the exceptions would allow as much speech as possible while also preventing the proliferation of signs and the resulting visual blight.

The question of the constitutionality of the Act is not before the Court. Nevertheless, a comparison of the competing interests at stake in Ladue's sign ordinance with the interests affected by the federal Act demonstrates that Ladue's ordinance has a stronger claim of constitutional validity.

Ladue's regulation involves a very small geographical area (8.5 square miles) in which there has been placed a high value on aesthetics and residential privacy. Aesthetics and the prevention of visual blight are interests that unquestionably deserve to be protected on our nation's highways through sign regulations such as the Highway Beautification Act. Nevertheless, it would be difficult to argue that all parts of our nation's highway system,

spanning thousands of miles, have a unique aesthetic ambience or quality of privacy that deserve greater or even the same protection as the beautifully landscaped and carefully preserved small residential neighborhoods in Ladue.

This Court should not interpret the First Amendment to give signs and billboards a unique and privileged status in the law. In today's world of advanced communications, there are many modes of expression that are available for all people to use. If Ladue and other cities cannot enact reasonable sign regulations, people will lose their right to be free of visual blight that diminishes the quality of their lives.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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November 15, 1993